No. 12114

In the United States
COURT OF APPEALS
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,

Appellant,

-vs-

GRANGE OIL COMPANY OF LINN AND BENTON COUNTIES, a co-operative corporation,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from United States District Court for the State of Oregon.

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SUBJECT INDEX

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ARGUMENT

The appellee devotes considerable of its brief to the question whether under the law of Oregon the false statement of value filed by the appellee constituted a breach of warranty. We did not contend in our brief that the over-statement of the amount of specific insurance in the statements of value filed by the appellee

constituted a breach of warranty which worked a total forfeiture of the policy. We did contend, however, that the proper interpretation of the policy requires that effect be given to paragraph 3 of the standard provisional stock form (T. 58) which expressly provides "and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder."

Appellant has never contended that appellee was guilty of a breach of warranty which worked a forfeiture of the policy; if such had been its position it would never have paid the substantial sum of money to appellee that it did. Rather, appellant from the time it first submitted proof of loss to the appellee has consistently and without equivocation maintained the position that the erroneous reports of specific insurance resulted in "under-reporting of values" within the meaning of the "honesty clause," Section 5C. Thus, the case is brought squarely within the rule of *Wallace v. World Fire and Marine Insurance Company,* 70 F. Supp. 193, aff'd 166 F. (2d) 571, that where the insurer has protected itself from loss on account of erroneous reports by means of an "honesty clause" there is no basis for a forfeiture on account of such reports. If, however, the court were to hold in this case that appellant was not protected by its "honesty clause," the overstatement of the specific insurance immediately becomes a breach of a promissory warranty material to the risk to the extent of the overstatement. (*Atlantic Fruit Company v. Hamilton Fire Insurance Company of New York,* 251 N.Y. 98, 167 N.E. 184.)

Counsel for appellee have suggested that we have now departed from the original construction of the loss formula, Sections 5A, 5B, 5C, and 5D, which the adjuster for appellant used in tendering Proof of Loss to appellee to be executed and that we are now proposing a different construction on this appeal (Appellee's Brief 6). This is not so, and we assume that this unintentional error will be corrected by appellee after reference to their records without the need of filing a supplemental transcript to include plaintiff's exhibit 6, which is the Proof of Loss above referred to (T. 39).

Appellee has commented at length upon the defenses raised by appellant on the trial of this case in the District Court. Suffice to say that on this appeal we have elected to present to the Court for determination the fundamental and primary issue of whether or not appellant's policy and loss formula are to be construed according to the plain language of their content and the intent of both parties to the contract. That a contract should be construed so as to effect the intent of the parties to it is basic law. In this case the appellee through its manager admitted on the trial of the case that it had intended to have the disputed portion of this loss insured in another company (T. 90, 92). In fact, it went to great length to establish this point in order to show that there was no actual fraud involved. The fact that the appellant never intended to insure this portion of the loss is conclusively shown by defendant's exhibit 24 (T. 43) which is the provisional ledger sheet recording posted values covered under the policy. A comparison of this ledger sheet with the summary of

reports of values on Plant 2 (T. 45) will disclose that in every entry the amount of specific insurance reported was deducted before posting. The ledger sheet is the basis for computing premium earned (T. 126). Thus, there was at no time prior to the subject loss an intent by either party to have the disputed portion of the loss covered under the provisional policy.

While technically paragraph 3 is not a warranty whose breach completely avoids the policy, it is highly relevant in determining what is meant by the words "the statement of value" as used in Section 5C (T. 49).

The appellee correctly interprets our argument (appellee's Brief 18) as being that the language of Section 5C uses the words "statement of value last filed" as referring to the statement described in Section 3. Section 5C expressly defines the "statement of value last filed by insured *in accordance with the provisions of paragraph 3.*" Turning to paragraph 3 we find the requirement, mandatory in nature, that "the insured *shall* also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder." The words "in accordance with the provisions of paragraph 3" appearing in Section 5C indicate that the words "the statement of value last filed by insured" refers to a document and not merely to a defined value. The definition of "value" in Section 4 appears by reference to Sections 4A, 4B and 4C to mean that where the word "value" is used in the sense of the "Value of stock" then such value shall be determined by the definitions contained in Sections 4A, 4B and 4C.

Section 5C does not simply use the word "value" standing alone, in which event it could be argued that the definition limits its meaning, but "value" is used in combination with important words preceding and following it, that is, *"the statement of* value last filed by insured *in accordance with the provisions of paragraph 3."* It is a well-established rule that all portions of an instrument shall be considered in interpreting its meaning. The definition of the one word "value" must give way to the context of that word ("statement of") and the subsequent definition of just what "statement of value" is intended by Section 5C.

The context of the use of the word "value" in Section 5C not only permits, but requires, the words "statement of value" to mean a document which, by the last clause of paragraph 3, "shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder."

To put the matter another way (which we attempt because appellee on page 18 of its brief says "for some reason not made clear to us Michigan contends, however, that Section 5C entitles it to a further deduction in computing the amount of insurance"), we again call the Court's attention to the fact that 5C refers not simply to "value," which is the word which is defined, but also uses the modifying words "the statement of" value. Now, the word "statement" is in effect itself defined. "Statement" is defined by paragraph 3 to "include" the "amount of any non-provisional insurance on said stock." Section 5C does not leave to inference that it is this type

of a statement which Section 5C means, but 5C refers back to paragraph 3 and says that the "statement of value" which 5C is talking about is "the statement of value last filed by insured *in accordance with the provisions of paragraph 3.*"

Paragraph 7 buttresses our contention that the amount of specific insurance is an integral and important part of the statement required by paragraph 3 and mentioned in Section 5C. While it provides that the premium shall be determined "on the average of values filed with this insuror * * * as required in paragraph 3" it reduces the premium by further providing "but no premium shall be charged * * * on any value protected by non-provisional insurance against the hazards covered hereunder reported *in accordance with paragraph 3.*"

Section 8 of the form (T. 61) also supports our contention that the "statement of value last filed by insured in accordance with the provisions of paragraph 3" means it includes not only the statement of the value of stock, but also the statement of the amount of any non-provisional insurance on said stock. This is true because Section 8 gives the privilege to the insured "to make any changes desired by him in the last previously filed statement required in paragraph 3 but such changes shall not be effective unless made in writing and filed with this insuror or its designated agent *before a loss shall have occurred.*" The words "any changes" refer not simply to the value of stock but also to (a) an estimate sufficient to cover errors or omissions in ascer-

taining the value of stock and also (b) an amount of any non-provisional insurance. *Section 8 thus recognizes that the "statement of value" required by paragraph 3 covers something more than simply stock values.*

That the parties treated the statement of specific insurance as an important and integral part of the true statement required by Section 3 is shown by the reporting form (T. 44) which included the statement that "Following is a true statement of the actual cash values of all stocks * * * and all Non-Provisional Fire Insurance on such stock."

Furthermore, this statement recites the insured's understanding that in determining the amount of insurance the "non-provisional insurance, if any" shall be deducted.

The appellee argues (p. 23) that "there is good reason for Michigan to have concluded that it should insist on complete accuracy in the reporting of the value of stock of the goods while being less strict about an amount of specific insurance." Since the premium to be paid to the insurer and also the amount of insurance in force also depend upon the amount of specific insurance reported there is no reason whatever for the insurer to be less strict about the report of the amount of specific insurance than about the value of the stock of goods. The truth is that the "easy" ascertainment of the amount of specific insurance, mentioned by the appellee (p. 23), is all the more reason for insisting

upon the accurate reporting of the amount of specific insurance.

The appellee's argument is really a boomerang. The ease with which the appellee could ascertain the amount of the specific insurance is the more reason for requiring an accurate statement than if the fact reported related to a matter of opinion. At the same time the unlikelihood of an insured making either a fraudulent or an unintentional misrepresentation of the amount of specific insurance justified the insurer in not spelling out with elaborate provisions the result of an overstatement of specific insurance.

Whether fraudulently or innocently misstated, the overstatement of the amount of specific insurance does under paragraph 7 result in reducing the premium actually charged to the insured. While the appellee argues (p. 24) that "Michigan clearly has the right to collect whatever premium may be due it under the provisions of Section 3," the only right appellee refers to is a suit for damages for a breach of contract, and in this case the appellee offers to pay whatever premium is due. After loss, this is indeed a mild concession!

The appellee contends that an honest mistake must be treated differently under the contract than a fraud case. This contention, however, does not authorize warping the language of the contract to give insurance to the appellee for which it did not pay, on the theory that it was innocent of wrongdoing. The result of an overstatement of specific insurance has exactly the same result in reducing the premium whether such over-

statement is fraudulent or merely careless. Also, Section 3 gives to the assured the right to include in its true statement an estimated amount sufficient to cover errors or omissions and thus provides it with a means to protect itself against the consequence of an honest mistake.

In interpreting the policy, therefore, the Court should consider, we submit, that neither of the parties to the insurance contract intended that the insured should have insurance for which, under the reports filed, it was not paying a premium.

The reference on page 36 of the appellee's brief to the policy limit of $145,000 is misleading. In an ordinary fire policy when one refers to the limit he refers to the amount of insurance for which the company is receiving a premium. The connotation which the appellee seeks to denote by the use of the phrases "the limits of liability assumed by Michigan" and "the limits of Michigan's risk that it agreed to assume on this property," on page 36 of its brief, is that the insurer was being paid for insurance beyond the loss claimed. Such connotation is a false one. In the present case the amount of the premium is *not determined by the limit of liability* to which the appellee refers, but is determined by the "statement of values" defined and specified in Section 3 of the standard provisional stock form which specifically includes "the amount of any non-provisional insurance on said stock against the hazards covered hereunder."

We submit that a fair reading of the entire form indicates that the words of Section 5C "the statement

of value last filed by insured in accordance with the provisions of paragraph 3" mean a document which by the express provision of paragraph 3 includes both the value of the stock and "the amount of any non-provisional insurance on said stock." Therefore, the overstatement of specific insurance in this statement results under Section 5C in a reduction of the amount of insurance available to the appellee.

It is apparent from the tenor of appellee's brief that it has resorted to juxtaposition of other inapplicable clauses of the policy in an attempt to create an ambiguity, where in fact there is none, for the purpose of invoking the familiar rule of construction of insurance policies in favor of the insured. The Oregon court has succinctly stated the rule applicable to this case in *Clark Motor Co. v. United Pacific Insurance Co.,* 172 Or. 145, 139 P. (2d) 570, as follows:

> "An insurance policy, like any other contract, is to be construed in accordance with the intention of the parties which is to be ascertained from the entire agreement. The policy must be viewed by its four corners. All parts and clauses must be construed to determine if and how far one clause is modified, limited, or controlled by others. Any reasonable doubt as to the meaning of the policy must be resolved in favor of the insured."

Application of the above rule is all we ask. There is no ambiguity in the duty of insured to report truly its specific insurance under the terms of Section 3. There is no ambiguity in the prohibition of making changes in reports of values after a loss has occurred under the terms of Section 8. There is no ambiguity in the pro-

hibition under Section 7 of charging a premium on values reported covered by specific insurance. There is no ambiguity in the meaning of "statement of value" under Section 5C as referring to the reports of values of stocks and of specific insurance thereon. In view of the foregoing provisions and the admitted facts of this case, it is inescapable that there was an under-reporting of values in the month of November within the meaning of Section 5C; therefore, according to the plain terms of that section, the amount of provisional insurance in effect at the time of the loss was further reduced by the amount that the specific insurance had been over-reported in November, 1946. To hold otherwise would render meaningless each of the terms of the policy above referred to.

The appellant having paid the full liability as determined from the insured's own reports of the amount of specific insurance, ought not to be required to pay an additional sum of insurance for which it would not have received any premium. The judgment below should therefore be reversed.

Respectfully submitted,

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